DINESH KANAVAJI KANAWAGI & ANOR v. VIRGIN PROPERTIES SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
LAU BEE LAN J
[ORIGINATING SUMMONS NO: 24NCC-192-05-2014]
26 APRIL 2015

CIVIL PROCEDURE: *Originating summons – Application for – Declaratory relief – Plaintiffs sought for declaration that they did not use their position as directors to gain benefits in lodgement of Form 24 of Companies Act 1965 – Plaintiffs to be charged under s. 132(2) (c) of Companies Act 1965 by second defendant – Whether provisions of Companies Act 1965 breached – Applicability of s. 355 of Companies Act 1965 – Whether relevant – Companies Act 1965, s. 354 – Whether only applies to civil proceedings – Whether afforded relief to directors as against proceedings by company only – Whether plaintiffs could not be afforded relief as against proceedings brought by a regulatory body*

CIVIL PROCEDURE: *Injunction – Interim injunction – Application for injunction to be granted to estop a regulatory body from proceeding with criminal charge against plaintiffs – Whether interim injunction would interfere with public element of second defendant's role and obligation as regulatory body*

COMPANY LAW: *Directors – Allotment of shares – Whether plaintiffs as directors of company used their position to gain benefits in lodgement of Form 24 of the Companies Act 1965 – Plaintiffs to be charged under s. 132(2) (c) of the Companies Act 1965 – Plaintiffs sought for declaration that they did not breach provisions of Companies Act 1965 - Applicability of s. 355 of the Companies Act 1965 – Whether relevant – Companies Act 1965, s. 354 – Whether only applies to civil proceedings – Whether plaintiffs could not be afforded relief as against proceedings brought by a regulatory body – Whether an interim injunction would interfere with public element of second defendant's role and obligation as regulatory body*

Vide an originating summons ('OS') in encl. 1, the first and second plaintiffs ('the plaintiffs') sought for, *inter alia*, the following reliefs (a) (i) a declaration that they did not use their position as directors to gain benefit or to cause prejudice to Virgin Properties Sdn Bhd in the lodgement of Form 24 of the Companies Act 1965 ('CA 1965'); (ii) a declaration that they did not breach any provisions of the CA 1965 in the lodgement of Form 24; and (b) an order that the second defendant be restrained or prohibited from instituting any action or interfering with the court's jurisdiction in granting appropriate relief in relation to the lodgement of Form 24. The plaintiffs, who were the directors and shareholders of the first defendant/company, had intended to increase the paid up capital of the first defendant and had instructed the company secretary, one Augustine Gregory Dicom ('Augustine') to prepare the necessary documents. The first defendant, being a private limited company with two identical and same directors and shareholders, issued the

A shares to the plaintiffs in accordance with the resolution made. On 4 September 2012, the second defendant received a complaint regarding the actions and conduct of both plaintiffs in their capacity as directors of the first defendant and commenced an investigation into the matter. The focus of the investigation was on the said Form 24 which was signed by the second B plaintiff and Augustine whereby (i) the plaintiffs in their capacity as directors of the first defendant had allotted 7,000,000 new shares of RM1 each to themselves; (ii) the said Form 24 was lodged in the second defendant's office; and (iii) all the newly allotted shares were paid in cash by both plaintiffs. The first defendant then wrote to the second defendant giving them notice that no C irregularity had taken place, or if there was, the first defendant would rectify or validate any issues provided the same was informed to them and as was permitted under s. 355 of CA 1965. However, on 19 May 2014, the second defendant had informed the plaintiffs' lawyers *via* a phone call that upon reviewing the investigation papers and on receipt of the Public Prosecutor's consent, the second defendant would be continuing with the charge proffered D against the first and second plaintiffs under s. 132(2) (c) of the CA 1965 at the Kuala Lumpur Sessions Court and had advised the plaintiffs' lawyers to inform the first plaintiff to attend court. The plaintiffs disputed the aforesaid statement of the second defendant and stated that they were not given any letter pertaining to the intended charges against them, and contended that E there was bad faith and an abuse of the court process on the part of the second defendant in not responding to their letter but chose instead to prosecute the first and second plaintiffs. The second defendant, however, denied the same and stated that (i) the second defendant was advised that ss. 354 and 355 of CA 1965 were not applicable to criminal proceedings where the prosecution F of offences were involved; and (ii) the plaintiffs' OS and injunction applications were made with the intention of absolving themselves from prosecution by the Public Prosecutor and it was an abuse of court process made in their own interest. Hence, the filing of the OS application seeking for the declarations prayed for and the notice of application made by the G plaintiffs seeking for an *ex parte* injunction order.

Held (dismissing plaintiffs' application for OS and interim injunction):

(1) The second defendant is a regulatory body established under the Companies Commission of Malaysia Act 2001 ('CCMA') and under the first schedule of the CCMA, one of the laws administered by the second H defendant was the CA 1965. Thus, it was entirely within the purview of the second defendant to conduct investigations acting on a complaint received by it in respect of the plaintiffs. The second defendant, having completed its investigations, had obtained the consent of the Public Prosecutor pursuant to s. 36 of the CCMA to initiate prosecution against I the plaintiffs under s. 132(2)(c) of the CA 1965. The second defendant was merely discharging its statutory function. (para 21)

(2) A perusal of s. 355 of CA 1965 clearly showed that it is concerned with the rectification of irregularities in the management or administration of a company, including the absence of quorum at any of a director's or company meeting or default in the observance of the memorandum of articles of the company, including the failure to lodge any declaration of solvency. Section 355 of the CA 1965 which was relied on by the plaintiffs was thus irrelevant. (para 22)

(3) Section 354 of the CA 1965 applies only to civil proceedings and has no application to criminal proceedings. Premised on the persuasive authority of the case of *Long Say Ting Daniel,* s. 354 of the CA 1965 "operated narrowly to afford relief to directors as against proceedings brought by the company only" and therefore the plaintiffs could not be afforded relief as against proceedings brought by the second defendant. (para 38)

(4) No injunction should be granted to estop the second defendant from proceeding with the criminal charge against the plaintiffs. The second defendant had obtained the consent of the Public Prosecutor to charge the plaintiffs under s. 132(2)(c) of the CA 1965 after completing its investigations. Further, the plaintiffs filed the OS application and the application for an *ex parte* injunction having full knowledge that the second defendant intended to charge the first and second plaintiffs in the KL Sessions Court. The interim injunction applied in this present case, if allowed, would interfere with the 'public duty' or 'public element' of the second defendant's role and obligation as a regulatory body. (para 40)

Case(s) referred to:

Customs and Excise Commissioners v. Hedon Alpha [1981] 2 All ER 697 ***(refd)***
Dr Mahesan & Ors v. Ponnusamy & Ors [1994] 1 LNS 201 HC ***(refd)***
First Nominee (Pte) Ltd v. New Kok Ann Realty Sdn Bhd & Anor [1982] 1 LNS 108 HC ***(refd)***
In Re Barry and Staines Linoleum Ltd [1934] 1 Ch 227 ***(refd)***
In Re Gilt Edge Safety Glass Ltd [1940] 1 Ch 495 ***(refd)***
Lawson v. Mitchell [1975] VR 579 ***(refd)***
Long Samat & Ors v. PP [1974] 1 LNS 80 FC ***(refd)***
Long Say Ting Daniel v. Merukh Nunik Elizabeth (personal representative of the estate of Merukh Jusuf, deceased) (Motor-Way Credit Pte Ltd, intervener) [2012] SGHC 250 ***(refd)***
Petaling Tin Bhd v. Lee Kian Chan & Ors [1994] 2 CLJ 346 SC ***(refd)***
Pioneer Haven Sdn Bhd v. Ho Hup Construction Co Bhd & Anor And Other Appeals [2012] 5 CLJ 169 CA ***(refd)***
PP v. Yeoh Teck Chye and Lim Hong Pung & Anor v. PP [1981] 1 LNS 93 FC ***(refd)***
Re IDEAGLOBAL.COM Ltd [2000] 3 SLR 100 ***(refd)***
Superintendent of Lands and Surveys, Kuching Division & Ors v. Kuching Waterfront Development Sdn Bhd [2009] 6 CLJ 751 CA ***(refd)***
Swee Leong Cheng v. Project Aqua Culture & Trading Co Pte Ltd [1988] 1 SLR 557 ***(refd)***
Tidalmarine Engineering Sdn Bhd v. Kerajaan Malaysia [2012] 3 CLJ 385 HC ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 132(2)(c), 132C, 169, 354(1), (2), 355(2), (3)
Companies Commission of Malaysia Act 2001, ss. 3(1), 17, 36
Federal Constitution, art. 145
Government Proceedings Act 1956, ss. 2, 29(1)(a)
Specific Relief Act 1950, s. 54

Betting and Gaming Duties Act 1972 [UK], s. 2(2)
Companies Act 1929 [UK], ss. 141(1), 372(1), (2)
Companies Act 1948 [UK], s. 448(1)
Companies Act 1961 [AUS], s. 365(1)
Companies Act (Cap 50) [Sing], ss. 163(1), 175, 197(4), 391(1), (2)

For the plaintiffs - Amer Hamzah Arshad (Melissa Ram with him); M/s Melissa Ram
For the 1st defendant - Shopna Rani Malakar; M/s Shopna Rani Malakar & Co
For the 2nd defendant - Mohamed Sufyan Mohd Mokhtar (Mohamad Zainal Abidin Ahmad with him); FC

Reported by Suhainah Wahiduddin

JUDGMENT

Lau Bee Lan J:

[1] *Vide* an originating summons ('OS') dated 22 May 2014 (encl. 1) the first and second plaintiffs ('the plaintiffs'/'the first and second plaintiffs' as the case maybe) sought for substantially the following relief:

(a) A declaration that the first and second plaintiffs as one of the directors and shareholders of Virgin Properties Sdn Bhd ('Virgin Properties'):

(i) tidak menggunakan kedudukan mereka sebagai pengarah untuk mendapat faedah atau menyebabkan satu kemudaratan kepada Virgin Properties Sdn Bhd dalam menyerahkan Borang 24 Akta Syarikat 1965 bertarikh 13/8/2008 dan menunjukkan bahawa modal saham berbayar Virgin Properties Sdn Bhd adalah RM7 juta. (prayer 1);

(ii) tidak memungkiri sebarang provisi Akta Syarikat 1965 dalam menyerahkan Borang 24 Akta Syarikat, 1965 bertarikh 13/8/2008 dan menunjukkan bahawa modal saham berbayar Virgin Properties Sdn Bhd adalah RM7 juta. (prayer 2);

(b) "Bagi satu perintah bahawa defendan kedua melalui diri sendiri, pekerja-pekerjanya, ejen-ejennya atau dalam apa jua bentuk pun disekat atau dilarang daripada memulakan sebarang tindakan atau mengganggu bidang kuasa Mahkamah untuk memberikan relif yang sesuai berkenaan dengan penyerahan Borang 24 Akta Syarikat, 1965 bertarikh 13/8/2008 dan menunjukkan bahawa modal saham berbayar Virgin Properties Sdn Bhd adalah RM7 juta sehingga penyelesaian kes ini. (prayer 3); dan

(c) "Bahawa kos guaman ini dibayar oleh Defendan Kedua." (prayer 4).

[2] The English translation of the court of the abovesaid relief is as follows:

(a) …

(i) "did not use their position as directors to gain benefit or to cause prejudice to Virgin Properties Sdn Bhd in the lodgement of Form 24 of the Companies Act 1965 dated 13/8/2008 which shows that the paid up capital of Virgin Properties Sdn Bhd as RM7 million." (prayer 1);

(ii) "did not breach any provision of the Companies Act 1965 in the lodgement of Form 24 of the Companies Act 1965 dated 13/8/2008 which shows that the paid up capital of Virgin Properties Sdn Bhd as RM7 million." (prayer 2);

(b) "An order that the 2nd Defendant *vide* itself, employees, agents or in whatever form be restrained or prohibited from instituting any action or interfering with the Court's jurisdiction in granting appropriate relief in relation to the lodgement of Form 24 of the Companies Act 1965 dated 13/8/2008 which shows that the paid up capital of Virgin Properties Sdn Bhd as RM7 million until disposal of this case." (prayer 3); and

(c) "that the cost of this action to be paid by the 2nd Defendant." (prayer 4).

[3] *Vide* a notice of application (*ex parte*) dated 22 May 2014 (encl. 4), the first and second plaintiffs sought prayer three stated above with costs to be in the cause. The court granted O.I.T of the same and fixed hearing of the *inter partes* application on 2 June 2014 which was adjourned to 19 June 2014. The second defendant opposed the *ex parte* order and the OS. With the agreement of the parties, the OS application (encl. 1) was fixed to be heard on the same date (19 June 2014) to allow parties to exhaust all affidavits. The *ad interim* injunction was granted till 19 June 2014.

[4] The material facts relevant to the hearing of the OS and the *inter partes* interlocutory injunction are these. The first defendant is a company incorporated in Malaysia pursuant to the Companies Act 1965 ('CA 1965'). The plaintiffs are both directors and shareholders of the first defendant.

[5] The second defendant ('SSM') is a corporate regulator established under s. 3(1) of the Companies Commission of Malaysia Act 2001 (Act 614) ('CCMA') entrusted with the statutory functions, *inter alia*, to ensure that the provisions of this Act and the laws specified in the first schedule are administered, enforced, given effect to, carried out and complied with, to regulate matters relating to corporations and companies and to encourage proper conduct amongst directors, secretaries and other officers of a corporation in order to ensure that all corporate and business activities are conducted in accordance with established norms of good corporate governance and to encourage and to promote corporate responsibility and business sustainability (s. 17 of the CCMA).

[6] The plaintiffs/directors intended to increase the paid up capital of the first defendant/company and instructed the company's secretary, Augustine Gregory Dicom, to prepare the necessary documents. The company's secretary prepared a draft of the documents and forwarded the same to the plaintiffs/directors on 24 March 2008 (exh. DK5, plaintiffs' affidavit in support/27-32).

[7] On 13 August 2008 pursuant to a resolution prepared by the company's secretary, the authorised share capital of the company was increased from RM100,000 to RM10,000,000 and the plaintiffs/directors were authorised by the general meeting to:

> issue and allot from the unissued capital of the company such number of shares out of the unissued capital of the company to any party of parties upon such terms and conditions and such purposes as the directors may deem fit. (exh. DK-6, Plaintiffs' Affidavit in Support/34)

[8] On 13 August 2008 the directors/plaintiffs pursuant to the authority given to them at exh. DK6 above, issued 7,000,000 shares as follows:

Dinesh Kanavaji (first plaintiff)	3,430,000
Ku Azahar bin Ku Abdul Razak	3,570,000

The first defendant being a private limited company with two identical and same directors and shareholders issued the shares to the plaintiffs in accordance with the resolution made.

[9] The plaintiffs and first defendant filed the company Form 24 dated 13 August 2008 as required by CA 1965 ('the said Form 24') (exh. DK7, plaintiffs' affidavit in support/37-40).

[10] In accordance to the statutory function as provided under s. 169 of CA 1965, the company/first defendant and the plaintiffs/directors filed their respective accounts for the material transaction to show the increase in the paid up capital as exhibited in exhs. DK8, 9, 10, 11, plaintiffs' affidavit in support:

Exhibit	Year Ended	Pages
DK8	30 June 2009	42-58
DK9	30 June 2010	60-78
DK10	30 June 2011	80-99
DK11	30 June 2012	101-121

[11] The second defendant received a complaint on 4 September 2012 regarding the actions and conduct of both plaintiffs in their capacity as directors of the first defendant. Having examined the contents of the complaint, the second defendant commenced an investigation into the matter.

[12] The focus of the investigation was on the said Form 24 which was signed by the second plaintiff and the first plaintiff's company secretary, Augustine Gregory Dicom.

[13] According to the said Form 24:

(i) the plaintiffs in their capacity as directors of the first defendant had allotted 7,000,000 new shares of RM1 each to themselves: first plaintiff with 3,430,000 and second plaintiff with 3,570,000;

(ii) the said Form 24 was lodged in the second defendant's office;

(iii) all the newly allotted shares (7,000,000 unit shares) were paid in cash by both plaintiffs.

[14] The first defendant then *vide* their letter dated 15 May 2013 wrote to the second defendant giving them notice that no irregularity has taken place or if there was, the first defendant would rectify or validate any issues provided the same was informed to them and as is permitted under s. 355 of CA 1965 (exh. DK12, plaintiffs' affidavit in support/122). The said letter was received by the second defendant on 16 May 2013 as per the second defendant's endorsement on it. The plaintiffs alleged they had a legitimate expectation that the second defendant as a regulatory body would respond to the said letter of the first defendant.

[15] According to the second defendant they had completed their investigations and upon scrutinising the investigation papers, the Public Prosecutor has given the consent to initiate prosecution against the plaintiffs in the Kuala Lumpur Sessions Court pursuant to s. 132(2)(c) of CA 1965. It is not disputed that on 15 May 2014:

(a) Miss Melissa Ram and Mr G Ravichantiran, the plaintiffs' lawyers came to the second defendant's office and had discussed with Mr Mohammad Azies Han bin Mohd Fadzil, the senior prosecuting officer since Mr Mohd Zulkhairi Kamaruzaman, the prosecuting officer handling the prosecution against the plaintiffs was not at the office then;

(b) At the said discussion, Mr Mohammad Azies Han had informed the plaintiffs' lawyers that the second defendant would review (menyemak semula) the investigation papers and the charge that was to be proffered against the plaintiffs on 19 May 2014 at the Kuala Lumpur Sessions Court was to be adjourned;

(c) The plaintiffs wrote to the second defendant *vide* a letter of the same date (exh. MAH1, second defendant's affidavit in reply No. 2) (against the plaintiffs' *ex parte* order) seeking confirmation of the adjournment.

[16] According to the second defendant, on 19 May 2014 the second defendant informed the plaintiffs' lawyers *via* a phone call that upon reviewing the investigation papers and on receipt of the Public Prosecutor's consent, the second defendant would be continuing with the charge proffered

against the first and second plaintiffs under s. 132(2)(c) of CA 1965 at the Kuala Lumpur Sessions Court on 26 May 2014 and 28 May 2014 respectively and had advised the plaintiffs' lawyers to inform the first plaintiff to attend court on 26 May 2014. Save that the plaintiffs' lawyers had made a phone call to Mr Mohammad Azies Han, the plaintiffs disputed the aforesaid statement of the second defendant and stated that they were not given any letter pertaining to the intended charges against them and neither the consent of the Public Prosecutor.

[17] The plaintiffs contended that there was bad faith and an abuse of court process on the part of the second defendant in not responding to their letter of 15 May 2013 but chose instead to prosecute the first and second plaintiffs on 26 May 2014 and 28 May 2014 respectively. The second defendant however denied the same and stated (i) the second defendant was advised that ss. 354 and 355 of CA 1965 are not applicable to criminal proceedings where the prosecution of offences is involved and (ii) the plaintiffs' OS and injunction applications were made with the intention of absolving themselves from prosecution by the Public Prosecutor and it was an abuse of court process made in their own interest.

[18] Hence the filing of the OS application on 22 May 2014 seeking the declaration prayed for in para. 1 above and the notice of application made by the plaintiffs under a certificate of urgency on even date seeking for an *ex parte* injunction order as alluded to earlier.

[19] Having considered the written cum oral submissions of the plaintiffs and the defendants, the court dismissed (i) the plaintiffs' applications for the OS with costs of RM8,000 to be paid by the plaintiffs to the defendants and (ii) the plaintiffs' application for the interlocutory injunction heard on an *inter partes* basis with no order as to costs. The reasons for the decision are set out below.

Findings

[20] The plaintiffs submitted that they are entitled to the declaration in prayer 1(a) above based essentially on the following grounds:

(i) that s. 355(2) and (3) of CA 1965 provide:

> (2) The Court may if it thinks fit make an order declaring that the proceeding is valid notwithstanding any such defect, irregularity and deficiency.
>
> (3) Without affecting the generality of subsection (1) and (2) or of any other provision of this act, where any omission, defect, error or irregularity (including the absence of quorum at any meeting of the company or of directors) has occurred in the management or administration of the company whereby any breach of this act has occurred, or whereby there has been a default in observance of the memorandum or articles of the company or whereby any proceedings at or in connection with any meeting of the company

or of the directors thereof or any assemblage purporting to be such a meeting have been rendered ineffective including the failure to make or lodge any declaration of solvency pursuant to section 257, the court:

(a) …

(b) …

(c) …

(d) …;

(ii) of clarifying the plaintiffs' legal position (see *Petaling Tin Bhd v. Lee Kian Chan & Ors* [1994] 2 CLJ 346; [1994] 1 MLJ 657 (Supreme Court) at 673;

(iii) that the power of the court to grant declaratory order is unlimited (see *Dr Mahesan & Ors v. Ponnusamy & Ors* [1994] 1 LNS 201; [1994] 3 MLJ 312 (High Court) at 313 (Held 3);

(iv) that "The criteria in exercising the discretion is for the court to satisfy itself that any such order would not do injustice to the company or to any member or creditor thereof" (see *First Nominee (Pte) Ltd v. New Kok Ann Realty Sdn Bhd & Anor* [1982] 1 LNS 108; [1983] 76 at 77 E-F per Yusoff Mohamed J);

(v) that the second defendant has no *locus standi* to object to the plaintiffs' applications as the second defendant (i) is not member nor creditor of the first defendant; (ii) is only a nominal party; and (iii) is a regulatory body to accept the findings of the court.

Ground 20(v)

[21] I find there is no merit on ground (v) as it is undisputed that the second defendant is a regulatory body established under the CCMA and under the First Schedule of the CCMA, one of the laws administered by the second defendant is the CA 1965. Thus, it is entirely within the purview of the second defendant to conduct investigations acting on a complaint received by it in respect of the plaintiffs. As alluded to earlier having completed its investigations, the second defendant has obtained the consent of the Public Prosecutor pursuant to s. 36 of the CCMA to initiate prosecution against the plaintiffs under s. 132(2)(c) of the CA 1965. In my considered view, the second defendant is merely discharging its statutory function and thus the plaintiffs' contention that the second defendant has acted with *mala fides* and beyond the scope of its power and has abused the court process is without any merit.

Grounds 20(i) to (iv)

[22] A perusal of s. 355 of CA 1965 clearly showed that it is concerned with the rectification of irregularities in the management or administration of a company, including the absence of quorum at any of a director's or

company meeting or default in the observance of the memorandum or articles of the company, including the failure to lodge any declaration of solvency. With respect I find s. 355 of CA 1965 relied on by the plaintiffs is not relevant; however what is of relevance is s. 354 of CA 1965 as submitted by the second defendant.

[23] Section 354 of CA 1965 provides:

> (1) If in any proceedings for negligence, default, breach of duty or breach of trust against a person to whom this section applies it appears to the court before which the proceedings are taken that he is or may be liable in respect thereof but that he has acted honestly and reasonably and that, having regard to all the circumstances of the case including those connected with his appointment, he ought fairly to be excused for the negligence, default or breach the court may relieve him either wholly or partly from his liability on such terms as the court thinks fit.
>
> (2) Where any person to whom this section applies has reason to apprehend that **any claim** will or might be made against him in respect of any negligence, default, breach of duty or breach of trust he **may apply to the Court for relief**, and the Court shall have the same power to relieve him as under this section it would have had if it had been a court before which proceedings against him for negligence, default, breach of duty or breach of trust had been brought.
>
> (3) The persons to whom this section applies are:
>
> (a) officers of a corporation;
>
> (b) persons employed by a corporation as auditors, whether they are or are not officers of the corporation;
>
> (c) experts within the meaning of this Act; and
>
> (d) any persons who are receivers, receivers and managers or liquidators appointed or directed by the Court to carry out any duty under this Act in relation to a corporation and all other persons so appointed or so directed.
>
> (emphasis added)

[24] I am persuaded by the argument of the lead counsel for the second defendant, Mr Mohd Sufyan Mohd Mokhtar that the issue at hand is whether s. 354 of CA 1965 is wide enough to provide relief to the plaintiffs against criminal proceedings.

[25] Mr Mohd Sufyan stated that their research showed the Malaysian Courts has yet to decide on the applicability of s. 354 of CA 1965 on criminal proceedings. In this regard learned lead counsel drew the court's attention to the case of *Pioneer Haven Sdn Bhd v. Ho Hup Construction Co Bhd & Anor And Other Appeals* [2012] 5 CLJ 169; [2012] 3 MLJ 616 (per Zainun Ali JCA

(now FCJ)) (delivering judgment on behalf of the Court of Appeal), in particular the *dicta* of the Court of Appeal at p. 226 (CLJ); p. 662 (MLJ) para. 284 (CLJ); para. 289 (MLJ):

> [289] Even if the defendant directors' (D4-D8) were to be liable for breach of their directorial duties, they could rely on the protection afforded them under s. 354 of the Act to relieve them of their liabilities.

The second defendant argued that the *dicta* quoted above is *obiter dicta* and the Court of Appeal did not address the specific point on whether s. 354 of CA 1965 applied to criminal proceedings.

[26] However the lead counsel for the plaintiffs, Mr Amer Arshad submitted the directors in *Pioneer Haven (supra)* were said to be in breach of s. 132C of CA 1965 and when the Court of Appeal opined that the directors could still resort to s. 354 to relieve them of their liabilities, Her Ladyship would have been aware that s. 354 attracted a penal sanction. Hence learned counsel argued it was not *obiter* but the Court of Appeal has *sub silentio* endorsed that s. 354 of CA 1965 extended to penal proceedings.

[27] With respect I am of the opinion that the *dicta* at para. 289 quoted above in *Pioneer Haven*'s case is *obiter dicta* as the opening words of para. 289 are "Even if the defendant directors' (D4-D8) were to be liable …" and in the preceding para. 282 (CLJ); para. 287 (MLJ) of the same p. 225 (CLJ); p. 662 (MLJ), Her Ladyship opined:

> [287] We fail to find evidence of the defendant directors acting in a manner contrary to good faith and for irrelevant purposes in this appeal. Ho Hup has also not shown that the defendant directors had acted improperly.

[28] Further, at p. 227 (CLJ); p. 663 (MLJ) para. 290 (CLJ); 294 (MLJ), Her Ladyship held:

> [294] Thus s. 354 of Act could be invoked too, if need be, to relieve the defendant directors from the alleged liabilities since they had acted honestly and reasonably at all material times.

It is observed that the aforesaid finding is made after a discussion on proof of the requirements under s. 354(1) of CA 1965 with its equivalent s. 365(1) of the Australian Companies Act 1961. Therefore with respect Her Ladyship is in fact satisfied that the defendants' directors could seek relief under s. 354 in respect of civil proceedings, as there is proof that:

(a) the director has acted honestly (see para. 292);

(b) the director has acted reasonably (see para. 293);

(c) it is fair to excuse him having regard to all the circumstances of the case (see para. 293).

[29] Mr Ameer Arshad further submitted that (i) most, if not all of the sections in the CA 1965 have penal provisions and if s. 354 is said not to be available to the officer of the corporation, it would render s. 354 otiose and ineffective; (ii) s. 354 confers a right to an officer of a corporation; any restricting of such right should be expressly stated. Learned lead counsel cited the English Court of Appeal case of *Customs and Excise Commissioners v. Hedon Alpha* [1981] 2 All ER 697 at 701 d-e in support of the plaintiffs' contention the company can seek relief against criminal proceedings for the enforcement of CA 1965.

[30] On the other hand, Mr Mohd Sufyan argued that the power of the court to grant relief pursuant to s. 354 of CA 1965 is applicable for relief against civil claims only and not against offences which entailed criminal proceedings. In support of this proposition, learned lead counsel submitted:

(a) that this legal point has been considered at length by the Singapore High Court in *Re IDEAGLOBAL.COM Ltd* [2000] 3 SLR 100; [2000] SGHC 65 and *Long Say Ting Daniel v. Merukh Nunik Elizabeth (personal representative of the estate of Merukh Jusuf, deceased) (Motor-Way Credit Pte Ltd, intervener)* [2012] SGHC 250; and

(b) in the absence of a local authority, learned counsel has urged the court to adopt the decision of *Re IDEAGLOBAL.COM Ltd (supra)*.

[31] Section 354 of CA 1965 is in *pari materia* with s. 391 of the Companies Act (Cap 50, 1994 Rev Ed) of Singapore ('CA Cap 50'). The facts of *Re IDEAGLOBAL.COM Ltd* are that the applicant, Ideaglobal.com Ltd, was incorporated in Singapore. Having paid a dividend to its shareholders, believing that the dividend would be tax exempt, it was subsequently informed otherwise. In order to avoid exposing its shareholders to adverse tax consequences, the company was advised that the dividend payment be treated as an 'advance' or a loan to the shareholders. It was later discovered that one of the recipient shareholders was owned and controlled by a director of the applicant. As a result, the applicant and its directors had contravened s. 163(1) of CA Cap 50, thereby necessitating the present application for relief under s. 391. The main issue considered by the court was whether it had the jurisdiction to grant relief under s. 391 of CA Cap 50 from prosecution for an offence (see headnotes).

[32] Ideaglobal.com Ltd was applying for relief under s. 391(2) CA Cap 50 where an action was apprehended. This is similar to the present case where the second defendant intended to charge the plaintiffs under s. 132(2)(c) of CA 1965 and the issue which arose is whether the court has the jurisdiction to grant relief under s. 354(2) (in *pari materia* with s. 391(2) CA Cap 50) to the plaintiffs from prosecution for an offence. Lee Seiu Kin JC (as he then was) in *Re IDEAGLOBAL.COM Ltd (supra)* dismissed the application of Idealglobal.com Ltd for relief and held at 804:

> Section 391 did not apply to criminal proceedings. If it did, not only would there be a practical problem in the operation of the provision, the issue as to whether the court might then be said to be encroaching on the prosecutorial discretion of the Public Prosecutor and whether such encroachment would be unconstitutional would arise. If Parliament had intended such a fundamental change to the criminal process, it would have drafted the provision in much clearer terms.

The *ratio decidendi* was arrived at after His Lordship first considered the interpretation of s. 391(2) of CA Cap 50 (in *pari materia* with s. 354(2) of CA 1965) in the context of the entire section and found that the terms were not consistent with an intention to include criminal proceedings within its scope as follows (at 808 para 8):

> The first subsection relates to the situation where proceedings have been taken out against the applicant and the second where the applicant apprehends that such proceedings may be taken out. Therefore the word "claim" in sub-s (2) should bear the same meaning as the word "proceedings" in sub-s (1). A necessary further argument would be that the word "proceedings" is wide enough to cover a prosecution for an offence. The difficulty I have with this argument is that it is equally logical to say that the word "claim" in sub-s (2) indicates that the intention of the Legislature was to limit the word "proceedings" in sub-s (1) to matters in which the word "claim" is appropriate, ie to civil proceedings in which any party would have grounds to make a claim against the applicant. Subsection (2) also uses the word "proceedings" to describe the action referred to in sub-s (1) and therefore it cannot be said that the use of the word "claim" was not deliberate.

Secondly, His Lordship commendably conducted an exhaustive and painstaking analysis of the English cases of (i) *In Re Barry and Staines Linoleum Ltd* [1934] 1 Ch 227, (ii) *In Re Gilt Edge Safety Glass Ltd* [1940] 1 Ch 495 (which followed *In Re Barry and Staines Linoleum Ltd*), (iii) *Hedon Alpha Ltd (supra)* and (iv) the full court of the Supreme Court of Victoria of *Lawson v. Mitchell* [1975] VR 579.

[33] For purposes of the present case, it is my considered view that s. 354 of the CA 1965 applies only to civil proceedings and has no application to criminal proceedings. In arriving at my decision, I would gratefully adopt the reasoning of Lee Seiu Kin JC (as he then was) in the persuasive authority of *Re IDEAGLOBAL.COM Ltd* in the statutory interpretation of s. 391(2) of CA Cap 50 (in *pari materia* with s. 354(2) of CA 1965) and his treatment of the aforementioned three English cases and the Australian case and prefer like His Lordship to follow the narrower Australian view. I shall highlight the cases as addressed by Lee Seiu Kin JC in *Re IDEAGLOBAL.COM Ltd* below:

(a) *Swee Leong Cheng v. Project Aqua Culture & Trading Co Pte Ltd* [1988] 1 SLR 557, the petitioner there was issued summonses under ss. 175 and 197(4) of CA Cap 50 for being a party to the default of the company in failing to hold its 1983 and 1984 annual general meetings and in failing to lodge annual returns for those years, these being offences under CA

Cap 50. He petitioned the High Court for relief from those proceedings pursuant to s. 391(1) of CA Cap 50. Chan Sek Keong JC (as he then was) had the occasion to consider whether s. 391 of CA Cap 50 applied to criminal proceedings but declined to make any finding on this as he did not have the benefit of full arguments and it was not necessary for his decision as follows (at 816 para. 29):

> This leads me to the fundamental point as to whether s. 391 was ever intended to apply to criminal offences. The use of the expression 'claim' in s. 391(2) would suggest that relief is granted only for civil breaches of duty or defaults. It is true that in England, the courts have applied the equivalent provisions in the English Companies Act to grant relief against criminal sanctions: see *In re Barry and Staines Linoleum Ltd* [1934] Ch 227. However, in *Lawson v. Mitchell* [1979] VR 529, the Full Court of the Supreme Court of Victoria, after an exhaustive discussion of the history, the English provision and the English authorities, *viz In re Barry and Staines Linoleum Ltd and In re Gilt Edge Safety Glass Ltd* ([9] *supra*), came to the conclusion that the equivalent provision in the Victoria Companies Act 1961 did not apply to proceedings for an offence under the said Act. Counsel has not addressed me on this point. In view of my other findings, I will leave this point open for decision in some other application at some other time.

(b) *In Re Barry and Staines Linoleum Ltd* concerned a director who had inadvertently failed to obtain his qualification shares within the time fixed; after that time he had technically ceased to be a director although he continued to act and receive remunerations as a director. By petition under s. 372 of the English Companies Act 1929 (in *pari materia* with s. 391 of CA Cap 50 and s. 354 of CA 1965) for relief from liability under s. 141 of the English Companies Act 1929. Lee Seiu Kin JC's examination of the decision of Maugham J appears at 809 to 810 paras. 10 to 13 wherein, *inter alia*, he stated "Maugham J accepted that (s. 372 of the English Companies Act 1929) conferred jurisdiction to grant relief against prosecutions without any analysis of it".

(c) *In Re Gilt Edge Safety Glass Ltd* concerned two applicants who after they had ceased to hold the qualifying value of shares to be directors of a company had continued to act as directors. Summary proceedings were commenced against them in the Magistrates' Courts under s. 141(1) of the English Companies Act 1929. They petitioned for relief under s. 372(1) and 372(2) of the English Companies Act 1929. Lee Seiu Kin JC' examination of the decision of Crossman J appears at pp. 810 to 811 paras. 14 to 15 wherein, *inter alia*, he stated "The learned judge (Crossman J) accepted the decision (*In Re Barry and Staines Linoleum Ltd*) without any consideration of the scope of (s. 372 English Companies Act 1929)" and that "Crossman J only granted the petitioners relief from

civil liability to the company under s. 372(2) and held that an application for relief under s. 372(1) had to be dealt with by the court hearing the proceedings for the default.". A

(d) In *Hedon Alpha Ltd*, the third defendant was director of a company which carried on the business of an official bookmaker. The defendant company had failed to pay general betting duty due under the Betting and Gaming Duties Act 1972. The Commissioners of Customs and Excise brought proceedings under s. 2(2) of the Betting and Gaming Duties Act 1972 to recover the duty from the company and from the second and third defendants as its directors. In his defence, the third defendant pleaded that he had acted throughout honestly and reasonably and if he had been in default, he prayed for relief under s. 448(1) of the English Companies Act 1948 (*in pari materia* with s. 391 of CA Cap 50 and s. 354 of CA 1965). Lee Seiu Kin JC stated, *inter alia*: B C

> The court below ruled that s.448 did not apply to proceedings under s. 2(2) of the (Betting and Gaming Duties Act 1972) on two grounds: (a) that the commissioners' action was not a proceeding for default but for debt; and (b) that s.448 did not apply to proceedings for the recovery of debts or the enforcement of civil liabilities by third persons. … that proceedings under s.448 covered claims made against a party by companies or their liquidators, the Board of Trade and private prosecutors, including penal proceedings for the enforcement of the Companies Act. (at 813-814 para 23) D E
>
> The Court of Appeal dismissed the appeal, agreeing with the 2 grounds given in the court below… Stephenson LJ did not expressly approve the statement of the High Court that s. 448 applied to criminal proceedings and was content to say that: F
>
> > … s 448 is inapplicable to the commissioners' claim because it is inapplicable to any claim by third parties to enforce any liability except a director's liability to his company or his director's duties under the Companies Acts. (at 814 para. 24) G

His Lordship added:

> Griffiths LJ also did not expressly say that s. 448 applied to criminal proceedings and described it as applying where a director had:
>
> > Failed in some way in the discharge of his obligations to his company or their shareholders or who had infringed one of the numerous provisions in the Companies Acts that regulate the conduct of directors. (at 814 para 25) H
>
> Ackner LJ held that the word "default" in s. 448 referred to:
>
> > … a species of misconduct by an officer of a company or a person employed by a company as auditor, against liability for which a court may relieve him either wholly or in part. (at 814 para 26) I

(e) In *Lawson v. Mitchell (supra)* the facts of the case as set out by Lee Seiu Kin JC are the plaintiff there had laid an information before a Magistrates' Court to complain that the defendant, as director of a company, had not caused true and fair accounting records to be kept and thereby had committed an offence. After the Magistrate found that the offence had been made out, the defendant applied for relief pursuant to s. 365 of the Companies Act 1961 (in *pari materia* with s. 391 of CA Cap 50). The Magistrate agreed that in the circumstances relief ought to be given and dismissed the information. The plaintiff applied to the Supreme Court to review that decision.

(i) His Lordship (p. 811 para. 17) stated:

> Young CJ and Newton J (delivering a joint statement) and Kaye J declined to follow In re Barry and Staines Linoleum, Limited and In re Gilt Edge Safety Glass, Limited and held that s. 365 of the Companies Act 1961 did not apply to criminal proceedings.
>
> The conclusion was arrived at by Young CJ and Newton J from the viewpoint of statutory interpretation and the history of the provision as follows (at p. 812 paras 18, 19 & 20):
>
> > 18. … The learned judges found that whereas the words in the provision were "entirely apt" to cover relief from civil liability, they clearly had no application to criminal liability. One of the reasons given was in relation to s. 365(3) which is a provision relating to jury trials. Although this is not present in our Companies Act, this is relevant for the purpose of determining the scope of the section.
>
> … that the use of the words "defendant" and "judgment to be entered", and the reference to costs indicate that this refers to civil trials only and not to criminal trials at all.
>
> > 19. … that s. 365(2) was silent as to who would the respondent to the application be. While in civil proceedings this would be obvious, if it applied to criminal proceedings there is the question whether the Attorney-General was the appropriate respondent and whether an order under this provision would bind the Crown. Moreover, such powers would add little to the already-wide discretion given to the court to determine punishment upon conviction. And the word "claim" did not appear to be apt to describe a criminal prosecution. Furthermore, if the provision applied to criminal proceedings, it would cover all the offences under the Companies Act. The learned judges considered that there was no justification for the view that s. 365 was intended to operate as a proviso for these statutory offences, some of which already provided for relief if the officer concerned had acted honestly or reasonably. The joint judgment then embarked on a detailed consideration

> of the legislative history of s. 365 and concluded that it showed that the provision was not intended to apply to criminal proceedings.
>
> 20. … Maugham J had given no reasons in his extempore judgment for his conclusion that the provision applied to criminal proceedings. It appeared that no argument to the contrary was made to him as the only parties there were the petitioner director and the company itself. As for *In re Gilt Edge Safety Glass Ltd* ([14] *supra*), the conclusion of Maugham J was accepted as correct by Crossman J in the latter's extempore judgment, again without the contrary view being argued. The learned judges said that they found nothing in textbooks published prior to the first English decision which suggested that it was then thought that the provision could apply to criminal proceedings. Therefore, for the reasons they have given in relation to the statutory interpretation and legislative history of the provision, and the fact that they did not see any policy grounds to do so, they declined to follow the English decisions.

(ii) His Lordship observed Kaye J in a separate judgment (at p. 813 para 22):

> analysed s. 365 of the Australian Companies Act 1961 and concluded that the terms were not appropriate to refer to criminal proceedings [and] pointed out the inherent procedural problems if it did apply. … noted the antiquity of the two English decisions and the fact that references have since been made to them by learned commentators and authors. He (Kaye J) said that "this court ought not to depart from them unless there is some demonstrable error in the principle adopted by the Chancery Division". He (Kaye J) then embarked on an analysis of the legislative history of the provision and concluded that there were no circumstances that would warrant following those decisions as the provision, (at 600).

[34] With respect to the aforesaid cases, Lee Seiu Kin JC concluded at p. 816 paras. 31-32 as follows:

> 31. In *In re Barry and Staines Linoleum Ltd* ([10] *supra*), Maugham J in an extempore judgment, accepted without discussion that the provision covered criminal proceedings. In *In re Gilt Edge Safety Glass Ltd* ([14] *supra*), Crossman J said that such was the conclusion of Maugham J. But Crossman J did not need such a finding for the purpose of his decision which was that s. 372(1) was only applicable in the proceedings taken out in respect of the default. And in *Customs and Excise Commissioners v Hedon Alpha Ltd* ([23] *supra*), the English Court of Appeal did not make a unanimous finding that the provision applied to all criminal proceedings under the Companies Act. Only Ackner LJ commented on it. The learned lord justice held that s. 448 was restricted to claims by or on behalf of the

company or its liquidator against an officer or auditor for their personal breaches of duty with only one exception, which was in respect of the enforcement of certain duties imposed by the 1948 Act on the companies' officers.

32. The decision of the Full Court of the Supreme Court of Victoria in *Lawson v. Mitchell* ([16] *supra*) is the only decision in which a full consideration was made of the scope of the provision. In my respectful view, the reasoning there is unassailable. Chan Sek Keong JC in *Swee Leong Cheng v. Project Aqua Culture & Trading Co Pte Ltd* ([28] *supra*) appreciated that the terms used in s. 391 were relevant only to civil proceedings.

[35] It is explicit that the power to prosecute is given to the Attorney General pursuant to art. 145 of the Federal Constitution which provides:

(3) The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court-martial.

In *Long Samat & Ors v. Public Prosecutor* [1974] 1 LNS 80; [1974] 2 MLJ 152, the Federal Court determined the following question of law of public interest from the High Court:

whether in view of the fact that the accused were charged under section 324 of the Penal Code and tried by the magistrate in the lower court and decided therein when the facts clearly disclosed an offence under section 326 of the Penal Code the said trial was a nullity.

The Federal Court, *inter alia*, held that the Public Prosecutor is given wide discretion over the control and discretion of all criminal proceedings (see p. 157 of the report). In this context, I agreed with the view of Lee Seiu Kin JC that the question of encroachment by the court on the prosecutorial discretion of the Public Prosecutor and the constitutionality thereof may arise.

[36] Further if Parliament had intended s. 354 of CA 1965 to extend to criminal proceedings and to curtail the prosecutorial discretion of the Public Prosecutor, the Legislature would have drafted the provision in clearer and more explicit terms.

[37] At this juncture, it would be opportune to refer to the case in *Long Say Ting Daniel (supra)* cited by learned lead counsel for the second defendant. The facts are the plaintiff, Daniel Long Say Ting ("the plaintiff") became the sole director of Merukh Singapore Properties Pte Ltd ("the company") after the sudden demise of his co-director, one Dr Jusuf Merukh ("the deceased"). The deceased was the sole shareholder of the company. Shortly after the deceased's passing, the plaintiff granted options to purchase for three properties belonging to the company ("the three properties"). The estate of the deceased ("the Estate") then sent legal notices to the plaintiff alleging that he had granted the options to purchase without requisite authority, and in

breach of his duties as a director of the company and a trustee for the estate. The plaintiff thus applied for prospective relief under s. 391(2) of CA Cap 50 in anticipation of potential proceedings in negligence, default, breach of duty or breach of trust brought against him by the company or by third parties. One of the issues to be decided was the novel issue of whether s. 391 of CA Cap 50 (in *pari materia* to s. 354 of CA 1965) was wide enough to provide relief against proceedings brought by persons other than the company. Lee Seiu Kin J decided that s. 391 of CA Cap 50 operated narrowly to afford relief to directors as against proceedings brought by the company only. It did not extend to affording relief as against proceedings brought by persons other than the company. His Lordship found support for this interpretation in the legislative history of the English and Australian equivalents of s. 391 of CA Cap 50, the text and placement of s. 391 in CA Cap 50 and its legislative history.

[38] Premised on the persuasive authority of *Long Say Ting Daniel*, in the context of our present case, I am of the view that s. 354 of CA 1965 "operated narrowly to afford relief to directors as against proceedings brought by the company only" and therefore the plaintiffs cannot be afforded relief as against proceedings brought by the second defendant.

[39] The case of *Public Prosecutor v. Yeoh Teck Chye and Lim Hong Pung & Anor v. Public Prosecutor* [1981] 1 LNS 93; [1981] 2 MLJ 176 cited by the second defendant is with respect not applicable. The plaintiffs in this instant case were seeking for rectification under s. 355 of CA 1965 and not ratification by the board of directors. In *Public Prosecutor v. Yeoh Teck Chye (supra)* the Federal Court found that the wording of the various minutes lend support to the Deputy Public Prosecutor's contention that the management committee and the board were in doubt as to the second accused's lack of power to grant the so called short term overdrafts. The management committee met and recommended to the board to give covering approval for the facilities and the board met subsequently to specifically approve the said recommendations. It was in this context that the Federal Court held the act of ratification is of no assistance to the defence as:

> As regards the effect of ratification on criminal liability two authorities were brought to our notice *viz*. *Yeow Fook Yuen v. Regina* [1965] 2 MLJ 80 and *Mangal Sen v. Emperor* AIR 1930 Lah 57. From these authorities we are satisfied that ratification would not exonerate a criminal offence and no authority we are aware of or which has been brought to our notice says otherwise.
>
> We therefore hold that the act of ratification is of no assistance to the defence.

A **Whether The Injunction Order Ought To Be Granted**

[40] Upon a consideration of the following authorities cited by the second defendant, I am of the view that no injunction should be granted to estop the second defendant from proceeding with the criminal charge against the plaintiffs.

B **[41]** Section 2 of the Government Proceedings Act 1956 ('GPA'):

"Government" includes the Federal Government and the Governments of the States.

C **[42]** Section 54 of the Specific Relief Act 1950 ('SRA') reads:

54 Injunction when refused

An injunction cannot be granted:

(a) …

D (b) …

(c) …

(d) to interfere with the public duties of any department of any Government in Malaysia, or with the sovereign acts of a foreign Government.

E **[43]** Section 29 of the GPA:

(1) In any civil proceedings by or against the Government the court shall, subject to this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:

F Provided that:

(a) **where in any proceedings against the Government** any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific G performance, but may *in lieu* thereof make an order declaratory of the rights of the parties; and

(b) in any proceedings against the Government for the recovery of land or other property the court shall not make an order for the recovery of the land or the delivery of the property, but may *in* H *lieu* thereof make an order declaring that the plaintiff is entitled as against the Government to the land or property or to the possession thereof.

(2) **The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Government** if the effect I of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government.

(emphasis added)

[44] In *Tidalmarine Engineering Sdn Bhd v. Kerajaan Malaysia* [2012] 3 CLJ 385; [2011] 2 MLJ 400 involved a highway construction project of which the plaintiff was the main contractor. As a requirement of the award of the contract by the defendant, the plaintiff had posted a performance bond and an advance payment bond (issued by BIMB) with the defendant as beneficiary of the sums guaranteed therein. The defendant issued a notice of termination of contract on grounds that the plaintiff had suspended the works on site and it was anticipated that the plaintiff could not complete the works by the expected date after two extensions were given by the defendant. The failure on the part of the plaintiff continued to occur despite notice of intention issued by the defendant to terminate the contract. It was common ground that the two bonds were 'on demand' bonds. The plaintiff applied amongst others from BIMB under the two bonds for an order restraining the defendant from parting with any sums until disposal of an arbitration proceedings or further order of the court. One of the issues which arose was whether an injunction/restraining order as applied for could lie against the Government in view of the restrictions found in s. 29(1)(a) of the GPA.

[45] As pointed out by Varghese George JC (now JCA), judicial views are divided as to whether a temporary injunction (interlocutory injunction) as opposed to a permanent injunction can be issued against the Government, a department of the Government or against the officer or any related party to the Government. At pp. 412-413 paras. 32 and 33 of the report, His Lordship referred to the two positions in law:

> [32] The decisions of the Supreme Court in *Lim Kit Siang v. United Engineers (M) Bhd & Ors* [1987] 2 CLJ 195; [1987] CLJ (Rep) 170 and the recent judgment of the Court of Appeal in *Superintendent of Lands and Surveys, Kuching Division & Ors v. Kuching Waterfront Development Sdn Bhd* [2009] 6 CLJ 751; [2009] 5 MLJ 607 are cited as authority for the position in law that the courts discretion to grant injunctions are limited statutorily and do not extend to granting injunctions against the government, regardless of whether the injunction sought is interim/interlocutory or permanent.
>
> [33] On the other hand, the decision of our Court of Appeal in *Sabil Mulia (M) Sdn Bhd v. Pengarah Hospital Tengku Ampuan Rahimah & Ors* [2005] 2 CLJ 122; [2005] 3 MLJ 325 and the *dicta* found in the judgments of the Court of Appeal in *Kekatong Sdn Bhd v. Danaharta Urus Sdn Bhd* [2003] 3 CLJ 378; [2003] 3 MLJ 1 and of the High Court in *Tengku Haji Jaafar & Anor v. Government of the State of Pahang* [1977] 1 LNS 139; [1978] 2 MLJ 105 are relied on to argue that s. 29 of the Government Proceedings Act 1956 does not prohibit the grant of a temporary or interlocutory injunction against the government.

[46] In addressing the issue, His Lordship at pp. 399-400, para. 28 (CLJ); pp. 413-414, paras. 36 and 37 (MLJ) stated:

A [36] While there may be a case to allow interlocutory injunctions against the government in appropriate cases on the rationale forcefully stated in *Sabil Mulia, Kekatong* and *Tengku Haji Jaafar*'s cases, I am inclined to restrict it to only where it is obvious and clear that the government's discharge of public duties are not interfered with in any way.

B [37] After giving due consideration to the arguments of the respective counsel whether or not a 'public duty' would be interfered with or not in this case I take the position and accordingly hold that a restraining order as applied for here, if issued, will interfere with the 'public duty' or 'public element' of the defendant's role and obligations on the road project.

C **[47]** In *Superintendent of Lands and Surveys, Kuching Division & Ors v. Kuching Waterfront Development Sdn Bhd* [2009] 6 CLJ 751; [2009] 5 MLJ 607, the respondent purchased a piece of land and obtained approval for erection of buildings on the land from Dewan Bandaraya Kuching Utara. Due to stoppages in the construction works and with the site being deeply excavated it became a danger to the adjoining land and public at large. Due D to the non-compliance of the building plan and with the existence of danger to the adjoining land and the public, the appellants re-entered and forfeited the land. Being dissatisfied, the respondent filed a writ seeking a declaratory order, *inter alia*, that the purported re-entry was unlawful, invalid, null and void; the re-entry be set aside; and for damages. The respondent also applied E for an interim injunction. The High Court granted the interim injunction against the appellants and hence this appeal. The appellants claimed amongst others that s. 29 of the GPA and s. 54 of the SRA do not permit the granting of any injunction against the Government and Government departments respectively.

F **[48]** The Court of Appeal allowed the appeal of the appellants and set aside the interim injunction. On the issue of the balance of convenience factor, the Court of Appeal at p. 770 (CLJ); p. 620 (MLJ) at para. 29 (CLJ); para. 28 (MLJ) opined:

G [28] When courts are faced with injunction applications, the factor of balance of convenience has to be considered in the course of their deliberation, and when assessing where the balance of convenience lies, the interest of the public may rightly be taken into consideration (*Smith v. Inner London Education Authority* [1978] 1 All ER 411). No government departments can afford to take lightly any admission that the excavated area had posed a threat to the public. As Gopal Sri Ram JCA (as he then H was) delivering the judgment of the Court of Appeal in *Tenaga Nasional Bhd v. Dolomite Industrial Park Sdn Bhd* [2000] 1 CLJ 695; [2000] 2 MLJ 133 said:

I … I think counsel for the authority is right in saying that where the defendant is a public authority performing duties to the public one must look at the balance of convenience more widely, and take into account the interests of the public in general to whom these duties are owed.

[49] To reiterate the facts of this instant case showed that the second defendant has obtained the consent of the Public Prosecutor to charge the plaintiffs under s. 132(2)(c) of CA 1965 after completing its investigations. Further the plaintiffs filed the OS application and the application for an *ex parte* injunction on 22 May 2015 having full knowledge that the second defendant intended to charge the first and second plaintiffs in the KL Sessions Court on 26 May 2014 and 28 May 2014 respectively. I have addressed the issue that s. 354 of CA 1965 is not applicable to criminal proceedings and the plaintiffs cannot seek any relief under the said provision. In the light of the authorities I have referred to, I am of the view that the interim injunction applied in this present case if allowed would interfere with the 'public duty' or 'public element' of the second defendant's role and obligation as a regulatory body.

Conclusion

[50] For completeness in respect of the plaintiffs' OS, counsel for D1 informed the court that the first defendant has no objection to the reliefs sought by the plaintiffs as there is no detriment or oppression caused by the plaintiffs against D1.

[51] For the reasons adumbrated above, I had dismissed both the plaintiffs' application for the interim injunction during the *inter partes* hearing of encl. 4 and the OS application as per para. 6 above.